IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RICHLAND SCHOOL DISTRICT,

Plaintiff,

v.

THOMAS P., By and Through His Parent and Next Friend, LINDA P.,

Defendants.

OPINION AND ORDER

00-C-0139-X

On the evening of November 12, 1999, a group of vandals including defendant Thomas Peterson were involved in a vandalism spree that destroyed $40,000 worth of property at two elementary schools located within the Richland School District. After learning that Peterson, a senior at Richland High School, had been involved, the school district sought to expel him. However, because Peterson was receiving special education for a learning disability, the district was required to follow certain procedures set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487. Specifically, before it could expel Peterson the school district had to determine that his misconduct was not a manifestation of his disability.

The district easily found that Peterson's participation in the vandalism had nothing to do with his learning disability, and the school board voted to expel him. However, suspecting that there was something else going on with her son, Peterson's mother appealed the district's

manifestation determination and had Peterson evaluated by a clinical psychologist. The psychologist diagnosed Peterson with attention deficit disorder and dysthymia, and opined that these conditions led to his involvement in the vandalism incident. The administrative law judge who presided over the due process hearing not only considered this new evidence but found it persuasive enough to require him to set aside the expulsion.

Plaintiff Richland School District now seeks reversal of the ALJ's decision pursuant to 20 U.S.C. § 1415(i)(2)(A). The district contends that the hearing examiner exceeded the proper scope of his review by considering the evidence of Peterson's attention deficit and mood disorders. Also, the district contends that the ALJ's decision must be overturned because it is not supported by a preponderance of reliable evidence.

For the reasons that follow, I conclude that the district has not shown by a preponderance of the evidence that Peterson's misconduct was not a manifestation of his disability. Under the terms of the IDEA, it was not improper for the ALJ to consider evidence of Peterson's attention deficit disorder and mood disorder even though Peterson was not diagnosed with such disorders until after the district's manifestation determination.
This new evidence, which the ALJ found to be credible, consisted of admissible expert testimony which suggested that Peterson's misconduct may have been a manifestation of his ADD and mood disorder. Both at the administrative level and in this court, the district has failed to rebut much of the expert testimony presented by the student, leaving me with little choice but to affirm the ALJ's conclusion. As the ALJ noted, the burden is on the district to establish that Peterson's involvement in the vandalism was not a manifestation of his disability. Bearing in

mind the deference that is owed to state administrative determinations under the IDEA, I conclude that the district has not met its burden. Accordingly, the decision of the ALJ reversing the district's manifestation determination must stand.

STATUTORY FRAMEWORK

Before considering the facts of this case, it is helpful to outline the framework of the IDEA. The Individuals with Disabilities Education Act (formerly the "Education of the Handicapped Act") was passed in 1975 in response to Congress' perception that handicapped children in the United States were being excluded from education. *See Hendrick Hudson Board of Ed. v. Rowley*, 458 U.S. 176, 179 (1982) (discussing legislative history of the Act). The goal of the IDEA is to ensure a "free appropriate public education" for all children with disabilities. *See* Individuals with Disabilities Education Act, § 33, 20 U.S.C. § 1412(1)-(2)(B) (1994) (formerly the "Education of the Handicapped Act"), amended by IDEA Amendments of 1997, Pub. L. 105-17, Title I, § 101, June 4, 1997, 111 Stat. 60. The Act attempts to achieve this goal by conditioning federal funding on state compliance with a variety of substantive and procedural obligations. *See generally* 20 U.S.C. § 1412 (establishing eligibility requirements for states to qualify for assistance under IDEA).

One of the requirements imposed by the IDEA is that the state shall insure that all children with disabilities residing in that state are identified, located, and evaluated. 20 U.S.C. § 1412(a)(3)(A). The Act defines a "child with a disability" as a child with a disability who, "by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3). Once

a child has been identified as a child with a disability under the Act, the Act requires the state to assemble a team to evaluate the child and develop an Individualized Education Program ("IEP") tailored to the unique needs of the child. 20 U.S.C. § § 1401(11), 1414(d).

The IDEA also has specific provisions relating to the discipline of a child with a disability. For example, if a school seeks to expel or suspend a disabled student for more than 10 days, the child's IEP team must conduct a manifestation determination to determine if the behavior was related to the child's disability. 20 U.S.C. § 1415(k)(4). Pending the outcome of the manifestation determination, the school district must allow the child to remain, or "stay put," in his or her then-current educational placement. 20 U.S.C. § 1415(j). If the behavior subject to discipline is not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner they would be applied to children without disabilities. *See* 20 U.S.C. § 1415(k)(5)(A). The provisions governing manifestation determinations are as follows:

> In carrying out a [manifestation] review . . ., the IEP Team may determine that the behavior of the child was not a manifestation of such chid's disability only if the IEP Team—
>
> (i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including—
>
> (I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;
> (II) observations of the child; and
> (III) the child's IEP and placement; and
>
> (ii) then determines that—

> (I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aides and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
> (II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
> (III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

20 U.S.C. § 1415(k)(4)(C).

A child who has not yet been determined to be eligible for special education and related services and who has engaged in misconduct is entitled to these same procedural protections "if the local educational agency had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." 20 U.S.C. § 1415(k)(8)(A). The statute describes four circumstances in which the school district will be deemed to have such knowledge: 1) if the parent of the child has expressed concern in writing that the child is in need of special education or related services: 2) if the behavior or performance of the child demonstrates the need for such services; 3) the parent of the child has requested an evaluation of the child; or 4) if the child's teacher or other school personnel has expressed concern about the behavior or performance of the child to the director of special education or other personnel of the school district. 20 U.S.C. § 1415(k)(8)(B).

A parent who disagrees with the determination that the child's behavior was not a manifestation of the child's disability may request a hearing challenging the manifestation

determination. 20 U.S.C. § 1415(k)(6)(A)(i). The hearing officer's review is governed by 20 U.S.C. § 1415(k)(6)(B)(i), which provides that

> [i]n reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

20 U.S.C. § 1415(k)(6)(B)(i).

FACTS

From the findings of fact proposed by the parties and from documents in the administrative record, I make the following findings of fact solely for the purpose of deciding this motion.

Plaintiff Richland School District is a body politic duly incorporated, organized and operated pursuant to Wisconsin Statutes. Defendant Thomas Peterson is a citizen of Wisconsin, residing with his mother, defendant Linda Pickel, within the boundaries of the Richland School District. Peterson is a senior presently enrolled and attending classes at Richland High School, a school located within the boundaries of the school district.

Peterson has a learning disability and has been receiving special education services for that disability since early childhood. As required by the IDEA, his IEP has been reviewed annually and he has been reevaluated every three years. *See* 20 U.S.C. § 1414(1)(2). The most recent IEP was developed for Peterson in May, 1999, and implemented at the beginning of the

1999-2000 school year. Peterson's primary needs as identified on the IEP relate to reading skills.

With the assistance of special education services, Peterson has progressed academically. He completes his work on time and participates actively in classroom discussions. However, over the course of his high school career, he has had 54 disciplinary referrals for conduct ranging from truancy to disruptive behavior and insubordination.

On the evening of November 12, 1999, vandals destroyed $40,000 worth of property at two elementary schools located approximately nine miles apart from each other within the Richland School District. Suspecting that the culprits were Richland High School students, the police approached officials at the high school and asked them to identify students who they thought might have committed the vandalism. Principal Ken Ogi provided the police with a list that included Peterson. Ogi thought Peterson might have been one of the vandals because of his lengthy history of discipline and behavior problems at school.

Peterson eventually gave a statement to police in which he admitted to a role in the vandalism. Specifically, Peterson told police that two other students were responsible for actually vandalizing the schools but that he drove them to the schools fully aware of what they intended to do.

On or about December 17, 1999, the Richland County District Attorney shared with the school district information that the police had obtained in its investigation. Relying on the law enforcement records obtained from the district attorney and facts gathered through its own investigation, the school district decided to initiate expulsion proceedings against Peterson.

However, because Peterson is identified as "a child with a disability" under the IDEA and state law, the district first had to conduct a manifestation determination as required by 20 U.S.C. § 1415(k)(4) to determine whether or not Peterson's involvement in the vandalism was a manifestation of his disability.

On January 17, 2000, Peterson's IEP Team met to conduct a manifestation determination. Peterson and Pickel were at the hearing and were provided a full opportunity to participate. Although the extent and exact nature of Peterson's involvement in the vandalism was not established at the hearing, the team concluded that Peterson was a participant in the episode and that the behavior was not a manifestation of Peterson's learning disability.

At the hearing, Pickel raised concerns that Peterson might have an attention deficit disorder, pointing out that symptoms of such a disorder were noted on Peterson's triennial evaluation in 1995, when Peterson was in the eighth grade. Specifically, the 1995 report of the multidisciplinary team stated that Peterson "exhibit[s] behavioral and attentional problems that are indicative of an attention deficit hyperactivity disorder (ADHD)," but noted that Peterson had not been diagnosed with such a disorder. Record of Administrative Proceedings ("AR"), dkt. #3, Ex. 11 at 1. The report included teacher reports that Peterson needed to listen better, lacked motivation, irritated his peers, tuned out and disrupted the class with inappropriate behavior. *Id.* It indicated that Peterson's mother, plaintiff Linda Pickel, "may want to consider having Tom evaluated for a suspected Attention Deficit Hyperactivity

Disorder." *Id.* at 3. However, Pickel never asked the IEP team to conduct an ADHD evaluation.

In his written summary of the manifestation determination, school district psychologist Paul Pederson noted Pickel's concern about the possibility of an ADD or ADHD diagnosis:

> Ms. Pickel added emphasis to the reports found in the records, that suggest ADD or ADHD type behavior. Short attention, impulsive, distractible [sic], disorganized poor memory, etc., were all noted behaviors which could be used to argue that Tom may have been under this type of influence. It was recalled to the group that there is, at this time, one identified handicap, of Learning Disability to be considered . Additional handicapping conditions, if they were to be considered, would have to be a separate determination. However, the group was cognizant of this additional influence, i.e., the ADHD behavior list.

Ex. 5.

Pickel requested a due process hearing to challenge the IEP Team's conclusion that Peterson's involvement in the vandalism was not a manifestation of his disability. Pickel asserted that Peterson suffered from ADD or ADHD that had been overlooked previously by the district. Pending the due process hearing, the School District's Board of Education conducted an expulsion hearing, at the conclusion of which it voted to expel Peterson until the beginning of following school year. However, the board stayed the expulsion order pending resolution of the due process hearing concerning the manifestation determination.

The due process hearing was held on February 20 and 25, 2000. At the hearing, over the objection of the school district, Peterson presented the testimony of Dr. Sandra Eisemann, a licensed clinical psychologist whom Pickel had asked to conduct a psychological evaluation of Peterson following the IEP Team's manifestation determination. From interviews with Pickel

and Peterson and a review of Peterson's school records, including the 1995 triennial evaluation, Dr. Eisemann concluded that Peterson suffers from Attention Deficit Disorder (ADD) and dysthymia, a depressive mood disorder. Dr. Eisemann testified that, although Peterson displayed symptoms of hyperactivity when he was younger, those symptoms had subsided; however, Peterson was still "considerably more impulsive than other children his age." AR, dkt. #5 at 389.[1] Dr. Eisemann opined that Peterson's involvement in the vandalism was a manifestation of both ADD and dysthymia, noting that young males with ADD are chemically attracted to risk-taking and thrill-seeking behavior and do not think about the consequences of their behavior. According to Dr. Eisemann, the chemical attraction to the risk-taking behaviors could last for an entire evening. Although she was unable to apportion the degree to which Peterson's behavior was a result of his ADD versus his dysthymia, she stated that Peterson's primary diagnosis was the ADD. She testified that her understanding of Peterson's involvement in the vandalism was that he was simply the driver of the car, but that her opinion regarding the relationship between his behavior and his disability would not change if he had actively participated in the destruction of property inside the schools.

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[1]The *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994), or DSM-IV, does not recognize attention deficit disorder, or ADD, as a disorder separate from attention deficit/hyperactivity disorder, or ADHD. Rather, under the diagnostic criteria for attention deficit/hyperactivity disorders, a child who demonstrates at least six symptoms of inattention and meets the other diagnostic criteria would be diagnosed with Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type. A child who demonstrates at least six symptoms of hyperactivity-impulsivity would be diagnosed with Attention-Deficit/Hyperactivity Disorder, Predominantly Hyperactive-Impulsive Type. A child who has at least six symptoms of both types would be diagnosed with Attention-Deficit/Hyperactivity Disorder, Combined Types. *See DSM-IV* at 83-85. I assume that Dr. Eisemann used the abbreviation ADD to denote the diagnosis of attention-deficit/hyperactivity disorder of the predominantly inattentive type. Likewise, in this opinion I am using "ADD" to denote attention-deficit/hyperactivity disorder of the inattentive type, and "ADHD" to denote the hyperactive-impulsive form of the disorder.

The district presented school psychologist Paul Pedersen as a rebuttal expert. Although Pedersen has never treated children with ADD in a clinical setting, he has worked with such children in the educational setting for approximately 28 years. Pedersen testified that he had "reservations" about Dr. Eisemann's diagnosis because it was based on anecdotal statements from Peterson and his mother and did include current information from Peterson's teachers or school staff. He also disagreed with Dr. Eisemann's testimony that Peterson's participation in the vandalism was a manifestation of an alleged attention deficit disorder. Pedersen testified that, according to the statement Peterson gave to the police, he made a conscious decision not to enter the buildings with his accomplices, which demonstrated that Peterson "was exercising some control, that he was aware and did not want to be involved to the same extent . . . [t]hat's contraindicating the impulsivity of, as I know it, the attention deficit condition." AR, dkt. #5 at 425. However, Pedersen testified that he had reason to believe that Peterson's involvement in the vandalism was "much more," noting that it was learned at the manifestation determination meeting that one of the other vandals was overheard stating that Peterson was an equal participant in the destruction inside the school buildings. Pedersen testified that, if Peterson had been more actively involved in the vandalism as opposed to just driving the car, it would make it more likely that his behavior was ADD-related.

The ALJ's Decision

In a written decision issued on March 3, 2000, the Administrative Law Judge reversed the district's manifestation determination, concluding that the district had not met its burden

under the IDEA to show that the behavior that gave rise to the disciplinary action was not a manifestation of Peterson's disability. Admin. Find. of Fact., Concl. of Law and Order, dkt. #2, Ex. A. Although the ALJ agreed that Peterson's participation in the vandalism was not a manifestation of his learning disability, he found that Peterson had presented largely unrebutted testimony from Dr. Eisemann showing that he suffered from previously-undiagnosed ADD and a depressive mood disorder for an extended period of time, and that the behavior that gave rise to the disciplinary action was a manifestation of the untreated mood disorder and of impulsivity related to ADD. *Id.* at 5.

In reaching this conclusion, the ALJ noted that, at the time of the manifestation determination, "the Student's ADD and mood disorder were unknown and not forcefully raised." *Id.* at 7. However, he concluded that under the IDEA's relevant review provision, section 1415(k)(6)(B)(i), he was not limited to considering only that information that was before the IEP Team at the time it made its manifestation determination. *Id.* at 7. Moreover, the ALJ noted, the district and Pickel were both "made aware of the possibility of an ADD diagnosis when the Student was in 8th grade," but neither Pickel nor the district followed up with an evaluation and Peterson received no treatment. *Id.* at 5.

Responding to the district's argument that, even if Peterson has ADD and a mood disorder, he is not a "child with a disability" under the IDEA unless those disabilities adversely affect his educational performance, the ALJ found two pieces of evidence in the record that tended to show that Peterson's undiagnosed disorders did have a direct impact on his educational performance: 1) the notations in Peterson's eighth grade evaluation regarding his

poor listening skills, disruptive behavior and other ADD-related behaviors and 2) Peterson's lengthy disciplinary file. *Id.* at 6. The ALJ found "every reason to give strong weight to Dr. Eisemann's opinion," noting that her testimony was credible and persuasive, she was the only clinical psychologist who testified, she had 26 years of clinical experience with a special concentration in the problems of children and adolescents, and Peterson had been prescribed a powerful psychotropic medication as a result of a consultation with a psychiatrist who worked with Dr. Eisemann. *Id.* Also, he noted that Dr. Eisemann's testimony regarding Peterson's mood disorder was unrebutted. *Id.*

The ALJ summed up as follows:

> Further, the District has the burden of "demonstrating" that the behavior that gave rise to the disciplinary action was not a manifestation of the Student's disabilities. The record did not show that the ADD and depressive mood disorder "caused" the Student to participate in the disgusting acts of vandalism at the two elementary schools. Rather, the District failed to carry its burden to demonstrate that the behavior subject to the discipline was not a manifestation of the ADD and depression. There was every indication that the Student knew the consequences and impact of his behavior. However, the testimony of Dr. Eisemann was convincing that his untreated ADD and dysthymia "impaired" the Student's "ability to control" his behavior within the meaning of sec. 20 U.S.C. 1415(k)(4)(c)ii. As she put it, "This is an ill child, and I think he was ill from two points of view and it led to this behavior."

Id.

The ALJ concluded as a matter of law that the district did not have before it "all relevant information" relating to Peterson's disabilities at the time of the manifestation determination, as required by § 1415(k)(4)(c)(i), because it was unaware of the diagnosis of ADD and a depressive mood disorder. *Id.* at 8, ¶ 7. He stated: "In all fairness to the District,

at the time of the manifestation determination, the Student's ADD and mood disorder were unknown and not forcefully raised. But on the record currently before the Division, the expulsion must be set aside." *Id.* at 7.

OPINION

A. Standard of Review

The standard of review of administrative agency decisions under the IDEA is provided by 20 U.S.C. § 1415(i)(2)(B):

> In an action [challenging an administrative decision], the court—
> (i) shall receive the records of the administrative proceedings;
> (ii) shall hear additional evidence at the request of a party, and;
> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The standard of judicial review under the IDEA thus differs from that governing the typical review of a motion for summary judgment. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997); *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994). Instead of applying a highly deferential standard of review and treating the state administrative findings as conclusive if supported by substantial evidence, the district court must independently determine whether the requirements of the Act have been satisfied. *Board of Educ. of Murphysboro v. Illinois Board of Educ.*, 41 F. 3d 1162, 1166 (7th Cir. 1994). "However, because courts do not have special expertise in the area of educational policy, they must give 'due weight' to the results of the administrative decisions and should not substitute 'their own notions of sound educational policy for those of the school authorities which they review.'" *Id.* (quoting *Board of Educ. of*

Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982)); *see also Roy and Anne A. v. Valparaiso Community Schools*, 951 F. Supp. 1370, 1373 (N.D. Ind. 1997) (describing standard of review as lying "somewhere between the deferential and the de novo"). "'Due weight' necessarily implies some sort of deference" to the decisions of state hearing officers. *Murphysboro*, 41 F.3d at 1167.

Despite being termed summary judgment, the district court's decision is based on the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(B)(iii); *Hunger*, 15 F.3d at 669. When neither party has requested that the district court hear additional evidence, "there is nothing new presented to the district court; thus '[t]he motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record.'" *Heather S.*, 125 F.3d at 1052. The party challenging the outcome of the state administrative decision bears the burden of proof. *Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ.*, 938 F.2d 712, 716 (7th Cir. 1991).

B. Scope of Review of Manifestation Determination

As the ALJ noted, this case turns in large part on whether, in reviewing a manifestation determination, the ALJ is limited to the record that was before the IEP Team or whether she can consider new evidence. The administrative standard of review of manifestation determinations is provided by 20 U.S.C. § 1415(k)(6)(B)(i):

> In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that

> the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

The ALJ reviewed this provision and concluded that, "[o]n its face, this language does not restrict the hearing officer to consider only such information as was originally considered by the manifestation determination review team." Admin. Find. of Fact., Concl. of Law and Order, dkt. #2, Ex. A at 5.

The district contends that the ALJ's conclusion was incorrect as a matter of law. First, the district refers to the language of § 1415(k)(4)(C) which states that the IEP Team "may determine that the behavior of the child was not a manifestation of such child's disability . . . ". 20 U.S.C. § 1415(k)(4)(C)(first sentence). The district argues that the phrase "such child's disability" means only "the disability identified by the school district which makes the student eligible for special education in the first place"—in Peterson's case, a learning disability. Pltff.'s Brf. In Support of Mot. for Summary Judgment, dkt. #9 at 18-19. Thus, argues the district, the ALJ erred in considering evidence of Peterson's ADD/dysthymia diagnosis.

The district cites no authority to support its insistence that the court should engraft the phrase "identified by the school district" after the term "child's disability" in § 1415(k)(4)(C). Such support is lacking in the statute's plain language. 20 U.S.C. § 1415(k)(4)(C) states that "if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with *a* disability . . .", the IEP Team must determine that the child's behavior was "not a manifestation of such child's disability" before the school may take the proposed

disciplinary action. *Id.* (emphasis added). Under its express terms, the statute does not limit the IEP Team to considering only the disability "identified by the school district."

Nor may such support be found in the fact that § 1415(k) contains a separate subsection concerning students with as-yet-unidentified special education needs. *See* 20 U.S.C. § 1415(k)(8)(A). Although the district argues that subsection (k)(8) is the operative provision in this case because Peterson alleges that his misconduct was related to a disability for which he was not yet receiving services, the statute applies only to "[a] child who has not been determined to be eligible for special education and related services under this subchapter . . .". 20 U.S.C. § 1415(k)(8)(A). At the time of the vandalism incident, Peterson was determined to be eligible for such education and related services, albeit for a different disability than the one he asserts led to his misconduct. Under the statute's plain language, however, it appears that § 1415(k)(4)(C) applies to students alleging both a disability for which services are already being provided and a "new" disability for which they are not.

Notwithstanding the statutory language, the district urges that the ALJ's review of the manifestation determination should have taken into account only what was known of the child's disability by the IEP Team at the time of the manifestation determination—a "snapshot," so to speak—in accordance with the approach that several courts have employed in the context of reviewing the appropriateness of an IEP determination. *See, e.g., Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (refusing to judge appropriateness of child's IEP in hindsight, noting that IEP "is a snapshot, not a retrospective"); *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692, 701-02 (10th Cir. 1998) (same); *Carlisle Area Sch. v. Scott P.*, 62

F.3d 520, 534 (3rd Cir. 1995) (same); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (same). Although the district acknowledges that a manifestation determination was not at issue in these cases, it argues that the same rationale should apply nonetheless to manifestation determinations because the appropriateness of the IEP is one of the factors that the IEP team must consider in making the manifestation determination.

I disagree. As the court explained in *Roland M.*, the inquiry in a case challenging the appropriateness of an IEP is

> . . . not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate" education as defined in federal and state law . . . actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.

Id., 910 F.2d at 992. In contrast, a manifestation determination is by its very nature retrospective, for it looks back at the child's behavior and attempts to determine if the child's disability impaired his ability to understand and control his behavior. Although the IEP Team must also review the appropriateness of the IEP, that is only one part of the decision-making process described in the statute. Moreover, an IEP reflects certain choices among many that could have been made by the IEP team; with the advantage of hindsight, one can always argue that better choices could have been made. A manifestation determination, which seeks to determine whether a particular act at a particular time was related to a child's disability, does not involve this type of moving target.

Also, the IDEA's legislative history supports the ALJ's conclusion that the scope of the hearing officer's review under 20 U.S.C. § 1415(k)(6)(B)(i) is *de novo*. The House Report describing the 1997 amendments to the Act states:

> In reviewing a decision with respect to the manifestation determination in an expedited hearing, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C), used by an IEP Team when determining whether a behavior is or is not a manifestation of the disability. That is, the hearing officer in an expedited hearing, would determine that (1) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate, and special education services and related services, supplementary aids and services, and behavior intervention strategies were consistent with the child's IEP; (2) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and (3) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

H.R. Rep. No. 105-95, P.L. 105-17, *reprinted in* 1997 U.S.C.C.A.N. at 109. Clearly, this language contemplates that the hearing officer's task is not simply to review the findings of the IEP Team; rather, he is to take the place of the IEP Team and make his own independent determination of whether the agency has shown that the child's behavior was a manifestation of his or her disability in accordance with § 1415(k)(4)(C).

Finally, *Doe v. Oak Park & River Forest High School*, 115 F.3d 1273, 1281 (7th Cir. 1997) provides additional support for my reading of the statute. In that case, the parents of a child with a learning disability argued that they were prejudiced by the school's failure to provide them with adequate notice of a manifestation determination review because it prevented them from having sufficient time to obtain an independent evaluation "in order to persuade [the

school] that [the son's] misbehavior was related to his unevaluated ADHD." *Id.* At a due process hearing following the manifestation determination, the parents presented the testimony of two doctors who testified regarding the son's ADHD and its relationship to his misconduct. In rejecting the parents' claim of prejudice, the court agreed with the school and the district court that the doctors' testimony was "far from absolutely convincing in demonstrating that John had Attention Deficit Disorder ("ADD") or ADHD and that his misconduct was related to his disability." *Id.* at 1281. For the purposes of the case at bar, it is what the court did *not* say that is significant: the court did not indicate that it would have been inappropriate for the school to have considered the ADHD along with the child's learning disability.

For all these reasons, I find that the ALJ did not commit an error of law in concluding that he could consider evidence concerning Peterson's diagnosis of ADD and dysthymia even though that evidence was not before the IEP Team during its manifestation determination. Having reached this conclusion, it is unnecessary to decide whether the school district had "knowledge" of Peterson's ADD and mood disorder under § 1415(k)(8)(B).

C. Admissibility of Dr. Eisemann's Testimony

The district contends that Dr. Eisemann's opinions regarding Peterson's ADD and mood disorder and the effect it had on his behavior do not meet the standards for expert testimony as set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) and *Kumho Tire*

Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).[2] According to *Daubert*, a trial judge has an obligation under Fed. R. Evid. 702 to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." In *Kumho Tire Co.*, the Supreme Court extended *Daubert*, holding that the trial judge's gatekeeping obligation "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Id.*, 526 U.S. at147.

Courts in the Seventh Circuit employ a two-step inquiry for evaluating the admissibility of expert testimony under Fed. R. Evid. 702. *See Ancho v. Pentek*, 157 F.3d 512, 515 (7th Cir. 1998) (citing *Wintz v. Northrop Corp.*, 110 F.3d 508, 512 (7th Cir. 1997)). First, they examine the expert's testimony to determine whether it is scientifically reliable; if it is, they determine whether the testimony would assist the trier of fact (that is, whether the evidence is relevant). *See Kirstein v. Parks Corp.*, 159 F.3d 1065, 1067 (7th Cir. 1998) (citing *Cummins v. Lyle Industries*, 93 F.3d 362 (7th Cir. 1996)). In determining scientific reliability and validity, the critical question is whether the alleged expert employed scientifically reliable and valid methods. *See Ancho*, 157 F.3d at 515. As Judge Crabb observed recently, "At its essence, science *is* methods. As with scientific inquiry itself, the court's focus is on the process rather than on the results; as long as the methods are sound, the scientist and the court do not pass judgment on the results." *Werner v. Pittway Corp.*, 90 F. Supp. 2d 1018, 1031 (W.D. Wis. 2000) (citing

[2]I must reject the district's position insofar as it contends that the ALJ erred by admitting Dr. Eisemann's testimony at the due process hearing. Wis. Stat. § 115.80(5) provides that common law or statutory rules of evidence do not apply at due process hearings.

People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 537 (7th Cir. 1997)). Courts "must rule out subjective belief or unsupported speculation." *Id.* (quoting *Ancho*, 157 F.3d at 515).

The district contends that Dr. Eisemann's testimony was not scientifically reliable because she 1) "relied heavily" on a 1995 triennial evaluation that contained a scientifically-invalid report from school psychologist Dawn Koenig; 2) lacked sufficient evidence upon which to formulate her opinions; 3) failed to consider Peterson's use of alcohol on the night in question; and 4) reached a conclusion that is not supported by the *Diagnostic and Statistical Manual of Mental Disorders*, or DSM-IV. Although these challenges may be reasons to discount Dr. Eisemann's testimony, they are insufficient to demonstrate that the methods she utilized were so questionable as to render her opinion unreliable under *Daubert*. Dr. Eisemann is a clinical psychologist with 26 years of experience treating children and adolescents, many of whom receive special education services. She testified that she concluded that Peterson had ADD and a mood disorder based upon two meetings with Peterson and Pickel during which she obtained a detailed history and her review of Peterson's school records. Although the district has quoted various authorities and treatises to support its claim that Dr. Eisemann should have done more such as administer tests and observe Peterson's current behavior in school, its arguments fail to persuade me that Dr. Eisemann's methodology was unreliable. If anything, the authorities cited by the district have simply established that there is no "magic formula" for diagnosing ADD in adolescents. Dr. Eisemann's testimony is admissible.

Although the district's arguments have more force when construed as attacks on the weight of Dr. Eisemann's testimony, they require little discussion. Importantly, the district

presented all of these arguments to the ALJ.[3] The ALJ considered the district's arguments but rejected them, concluding that Dr. Eisemann's testimony was credible, largely unrebutted and deserving of significant weight. Having conducted my own independent evaluation of the evidence in light of the challenges raised by the district, I find no reason not to defer to the ALJ's conclusions regarding Dr. Eisemann's testimony. The ALJ, who has more experience in these matters than this court and who had the opportunity to observe the witnesses, wrote a thoughtful, well-reasoned opinion in which he explained his reasons for rejecting the district's challenges to Dr. Eisemann's testimony. Notwithstanding the unique standard of review called for by the IDEA, it would violate judicial economy and common sense to overturn such a credibility determination without a compelling reason. No such reason exists in this case.

It is especially worthy to note, as the ALJ did, that the school district has failed to present expert rebuttal testimony. Although the district did present some rebuttal evidence at the due process hearing through the testimony of school psychologist Pedersen, he did not conduct an evaluation of Peterson, did not offer any critique of Dr. Eisemann's diagnosis other than his opinion that she did not gather enough information, and he is not a clinical psychologist. Moreover, he was unable to offer any opinion on Dr. Eisemann's conclusion that Peterson suffers from a mood disorder.

Despite this somewhat one-sided record, the district did not seek to supplement the record with additional evidence. Although the district argues that it did not have time to

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[3]In its reply brief in this court, the district raised arguments that it had not made at the state administrative level. Because the district did not raise these arguments in its initial brief, they are waived. *See Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 846 n. 9 (7th Cir. 1999).

present its own expert witness at the due process hearing because there were only five business days between the date Dr. Eisemann testified and the date on which the ALJ had to issue a decision, it has offered no reason why it did not seek to introduce such evidence in this court. The IDEA at 20 U.S.C. § 1415(i)(2)(B) expressly allows a party to request the court to hear additional evidence, and a claim by the district that it was sandbagged by Dr. Eisemann's eleventh-hour testimony would appear to be a valid reason for supplementing the administrative record. *See, e.g., Town of Burlington v. Dept. of Education*, 736 F.2d 773, 790-91 (1st Cir. 1984), affirmed, 471 U.S. 359 (district court may hear additional evidence if needed to supplement record, for instance, to clarify gaps in administrative transcript owing to mechanical failure, unavailability of witness, improper exclusion of evidence by administrative agency or if "valid reasons" exist for party's failure to present some or all of expert testimony before state agency). Perhaps the district had its reasons for failing to ask this court for permission to present expert testimony to counter Dr. Eisemann's opinion. In the absence of such testimony, however, the preponderance of the evidence favors the defendants. The district simply cannot sustain its burden of proof by asking this court to invalidate a licensed clinical psychologist's opinion on the ground that it does not exactly jibe with the DSM-IV.[4]

[4]In fact, one of the treatises submitted by the district indicates that, although physicians should follow the DSM-IV criteria when diagnosing ADHD, the complex nature of ADHD is not well-suited to mechanistic formulas and the diagnostic criteria "remain a consensus without clear empirical data supporting the number of items required for the diagnosis." Practice Guideline, *Diagnosis and Evaluation of the Child With Attention-Deficit/Hyperactivity Disorder*, American Academy of Pediatrics, Vol. 105, No. 5 (May 2000), attached as appendix to Pltff.'s Reply Brief, dkt. # 16, at p. 6. According to the Practice Guideline, "[t]hese complexities in the diagnosis mean that physicians using DSM-IV criteria must apply them in the context of their clinical judgment." *Id.*

In sum, the district has not met its burden to show by a preponderance of the evidence that Peterson suffers only from a learning disability and does not have attention deficit disorder and a mood disorder.

D. Whether Peterson's Disabilities Had A Negative Impact On His Educational Performance

The district contends that, even if Peterson has ADD and dysthymia, he is still not entitled to the protections of the IDEA unless he is a "child with a disability," that is, that his educational performance is adversely affected by his disability. *See* 34 C.F.R. § 300.7(c)(9) ("Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . is due to chronic or acute health problems such as . . . Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder . . and . . . adversely affects a child's educational performance."). In support of its contention that Peterson's educational performance has not been adversely affected by his alleged ADD and dysthymia, the district points to the testimony of Vicki Faber, Peterson's learning disabilities teacher, who observed that Peterson completes his work in a timely fashion and actively participates in class. Also, the district notes that both Faber and Ann Preston, another one of Peterson's teachers, testified that his current educational placement is appropriate and that he is achieving educational benefit. Finally, the district notes that Peterson is only two credits shy of graduating from high school.

The ALJ disagreed with the district, finding that a preponderance of the evidence supported the conclusion that Peterson's educational performance had been adversely affected by his disorders. Specifically, the ALJ noted the problems identified on the eighth grade reevaluation, such as problems listening and disruptive behavior. The ALJ also referred to Peterson's lengthy disciplinary file as evidence that "supports the strong inference" that Peterson's untreated disorders had a detrimental impact on his educational performance.

Deciding this issue is a very close call. In the end, I am agreeing with the ALJ's finding but for slightly different reasons. First, in order to diagnose Peterson with ADD in the first place, Dr. Eisemann had to conclude that the disorder impaired him at school. *See* DSM-IV at 84 (impairment from ADHD symptoms must be present in two or more settings, e.g., at school and at home). Of course, the district contends that Dr. Eisemann did not have enough information to make this conclusion because she relied heavily on the "stale" information in Peterson's eighth grade evaluation and did not gather any current information from Peterson's teachers or the school psychologist or conduct any testing of her own. However, Dr. Eisemann did review Peterson's high school discipline file, which notes problems with truancy, disruptive behavior and insubordination. Moreoever, the record includes Dr. Eisemann's psychological report which outlines the history that she obtained from Peterson. AR, dkt. # 3, Ex. 14. Peterson told Dr. Eisemann that he has difficulty concentrating in school, often misses directions and has problems staying on task. He also reported that he gets very frustrated in school, has problems with authority, and develops an "attitude" when he gets overwhelmed

with school demands. *Id.* Dr. Eisemann opined that Peterson's ADD was severe enough to require immediate treatment, including medication.

Although Peterson's statements were subjective and may have been self-serving, information provided by district employees at the due process hearing provides at least partial corroboration. Vice Principal Ogi testified that the reason he provided Peterson's name to the police was because "Tom had a history of being insubordinate and a disregard for respect and just basic behavior in the school for disregard for anything that went on." Transcript of Admin. Hearing, dkt. #4 at 85. Preston testified that Peterson often seemed unmotivated to complete his self-directed history class, and sometimes slept at his desk. *Id.* at 255. Preston also testified that there were occasions when Peterson asked to go to the shop classroom or do something else instead of continue to the next unit. *Id.* at 256. Perhaps these are just the behaviors of a lazy, disrespectful student, but, in light of the entire record, they tend to support the inference that they were related to Peterson's ADD and mood disorder.

Finally, the effects of Peterson's disorders on his educational performance may have been ameliorated by the special education that he received for his learning disability. Preston indicated that in her classroom, students are allowed to get up and walk around, and work is done either one-on-one or in groups. She stated: "All the things we do with ADD students are addressed for learning-disabled students." *Id.* at 286. But simply because Peterson's placement by virtue of his learning disability would not change if he was also identified as an ADD student does not mean that Peterson does not qualify as a child with a disability on the basis of his ADD and mood disorder. Again, keeping in mind the deference that is owed to the findings of

the ALJ, I conclude that the district has not met its burden to show that Peterson's untreated ADD and mood disorder did not have a negative impact on his educational performance.

E. Whether Peterson's Behavior Was A Manifestation of His ADD and Mood Disorder

Finally, the district contends that, even if Peterson does have ADD and dysthymia, the evidence does not support the ALJ's finding that these disorders gave rise to his involvement in the vandalism. The district contends that, according to the statement he gave to the police, Peterson stayed in the vehicle and did not enter the schools even though he knew that his friends were going to commit acts of vandalism and even though he heard glass breaking. According to the district, these acts demonstrate that Peterson was able to "exercise restraint" and are inconsistent with his alleged impulsivity and attraction to risk-taking behavior.

I agree that it seems to run counter to common sense to characterize a conscious decision to remain in the vehicle while one's friends commit vandalism as an impulsive, thrill-seeking act. However, Dr. Eisemann believed otherwise, noting that "impulsivity" as she used the word was not limited to spur-of-the-moment decisions but could span activities over the course of an entire evening. Dr. Eisemann stated that on the night in question, Peterson was "doing things that were exciting" and "wasn't thinking about the consequences." Transcript of Admin. Hearing, dkt. # 5 at 394. She testified that once a child with ADD begins such risk taking behavior, it is very gratifying because of "the way they process the information in the brain." *Id*. Dr. Eisemann also testified that a related manifestation of ADD and dysthymia is that children who suffer with such disorders are easily swayed into making bad decisions. *Id*. at 395.

As noted previously, the ALJ found Dr. Eisemann's testimony credible and persuasive. He found specifically that her testimony was "convincing" that Peterson's untreated ADD and dysthymia impaired his ability to control his behavior within the meaning of 20 U.S.C. § 1415(k)(4)(C). Although I am not as convinced, I have before me only the cold transcript and did not have the opportunity to observe either Dr. Eisemann or Paul Pedersen, who testified that Peterson's behavior was not a manifestation of alleged ADD. As noted previously, deference is traditionally—and for good reasons—called for with respect to matters of credibility and the district has failed to present any evidence to convince me that the ALJ was wrong in accepting Dr. Eisemann's testimony over Pedersen's.

Also, as the ALJ found, the exact nature of Peterson's involvement in the vandalism incident was not firmly established. There was evidence introduced at the due process hearing that indicated that Peterson did not merely drive the vehicle but actually participated in the vandalism inside the elementary schools. Pedersen testified that, if that were the case, then it would increase the likelihood that Peterson's behavior was a manifestation of ADD. Although this is a somewhat minor point, it does support the ALJ's conclusion that the district had failed to meet its burden to show that Peterson's behavior was not a manifestation of his disability.[5]

F. Conclusion

[5]There is some irony here: by conducting its own investigation that indicated that Peterson's behavior was *more* reprehensible and that he was *more* culpable than simply driving the car, the school district actually made it *more* difficult to expel Peterson. Of course, the district did not foresee at that time how the record was going to develop in this case.

This opinion should not be read to suggest that a student who commits reprehensible acts may avoid disciplinary action by running to a psychologist and obtaining a post-hoc diagnosis of attention deficit disorder. Despite what seems to be a trend towards equating bad behavior with ADD or ADHD, they are not one in the same. Peterson presented credible evidence to show that he is among the small percentage of the population that suffers from this disorder.

ORDER

IT IS ORDERED that the motion of plaintiff Richland School District for summary judgment is DENIED. The March 3, 2000, decision of the Administrative Law Judge reversing the district's manifestation determination is AFFIRMED.

Entered this 24th day of May, 2000.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge